Supreme Court, U. S.
FILED
SEP 15 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1771

THE PEOPLE OF THE STATE OF CALIFORNIA and
THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA,
Petitioners,

VS.

CIVIL AERONAUTICS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT REPLY BRIEF OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONERS, AND OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, RESPONDENT

PAUL RODGERS,
General Counsel,
CHARLES A. SCHNEIDER,
Assistant General Counsel,
WILLIAM R. NUSBAUM,
Deputy Assistant General Counsel,
1102 ICC Building,
P. O. Box 684,
Washington, D.C. 20044,
Attorneys for Respondent the National Association of Regulatory Utility Commissioners.

JANICE E. KERR,
J. CALVIN SIMPSON,
MARTIN A. MATTES,
5066 State Building,
San Francisco, California 94102,
Attorneys for Petitioners the People of the State of California and the Public Utilities Commission of the State of California.

Dated: September 12, 1977.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

	Page
Grounds for reply	2
Allegation of new facts	2
The question presented	6
Conclusion	7

Table of Authorities Cited

Cases	Pages
Abbott Laboratories v. Gardner, 387 U.S. 136, 18 L.Ed.2d 681, 87 S.Ct. 1507 (1967)	3, 5
Frozen Food Express v. United States, 351 U.S. 40, 100 L.Ed. 910, 76 S.Ct. 569 (1956)	4, 5
Natick Paperboard Corp. v. Weinberger, 498 F.2d 125 (1st Cir. 1974)	4
Pennsylvania Railroad Co. v. United States, 363 U.S. 202, 4 L.Ed.2d 1165, 80 S.Ct. 1131 (1960)	4

Rules

California Rules of Court:	
Rule 24(4)	1
Rule 39	1

Statutes

Federal Aviation Act of 1958:	
Section 101 (49 U.S.C. 1301)	3
Section 901(a)(1) (49 U.S.C. 1471(a)(1))	4
Section 902(a) (49 U.S.C. 1472(a))	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1771

THE PEOPLE OF THE STATE OF CALIFORNIA and
THE PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA,
Petitioners,

VS.

CIVIL AERONAUTICS BOARD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT REPLY BRIEF OF THE PEOPLE OF THE STATE OF CALIFORNIA AND THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, PETITIONERS, AND OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, RESPONDENT

Pursuant to Rules 24(4) and 39 of this Court's Rules, petitioners, the People of the State of California and the Public Utilities Commission of the State of California (California), and respondent in support of petitioners, the National Association of Regulatory Utility Commissioners (NARUC), hereby reply to the Brief for the Civil Aeronautics Board (CAB),

respondent, in Opposition to California's Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered on March 14, 1977. The facts and history of his matter are set forth in detail in California's petition filed June 11, 1977, and in the supporting memorandum of respondent NARUC, filed July 29, 1977.

GROUNDS FOR REPLY

This reply is made necessary by two elements of the CAB's Brief in Opposition: (1) allegation of new facts by the CAB apparently intended to show that the CAB's orders challenged herein have not had "effects felt in a concrete way by the challenging parties," and (2) misstatement of the question presented by California's petition.

ALLEGATION OF NEW FACTS

For the first time in the course of this controversy, the CAB in its Brief in Opposition alleges that "PSA and Air Cal are now operating precisely as they were before the Board's orders: within the jurisdiction of the PUC"; and that, although such operations are in direct contravention of exemption authority granted to these carriers by the orders challenged herein, "There is no reasonable likelihood that the Board will initiate enforcement proceedings against the carriers at this time." (CAB Brief 5, 6.)[1] In view of these

[1]The CAB cites and attaches as an appendix to its brief a December 1976 letter from PSA reporting its intention to operate out of conformity with its CAB-granted exemption authority and

alleged facts, the CAB seeks shelter under the dictum of *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148-49, 18 L.Ed.2d 681, 691, 87 S.Ct. 1507 (1967), that judicial review may be postponed until "an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." CAB Orders 75-6-135 and 75-9-78, of which review is sought herein, granted and modified, respectively, limited exemption authority to provide air transportation as defined in Section 101 of the Federal Aviation Act of 1958, 49 U.S.C. 1301. These were, most assuredly, "formalized administrative decisions," and they have been rendered no less formalized by the responsible administrative agency's failure to enforce them.

Nor is it convincing to argue that the effects of the CAB orders have not been "felt in a concrete way" merely because the subject carriers have failed to comply with them. Although the CAB decorously characterizes the carriers as having "chosen not to limit their operations in the manner set forth in their exemptions" (CAB Brief 5), according to the CAB's interpretation of applicable law these carriers "are *now* engaged in air transportation without Board authority" (Order 75-6-135, Pet. App. 29). Such conduct if the CAB's orders are valid, violates the Federal Aviation Act and subjects the carriers to civil and criminal penalties, possibly amounting to $1,000

asserting its belief that such conduct is lawful, "[a]t least until the legal situation is clarified and determined in the pending court case." The CAB does not go so far as to suggest that this letter relieves PSA of any criminal or civil liability to which the Board's orders might subject it.

and $2,000 per day of violation, respectively. Federal Aviation Act Sections 901(a)(1), 902(a), 49 U.S.C. 1471(a)(1), 1472(a).

In the case of *Frozen Food Express v. United States,* 351 U.S. 40, 100 L.Ed. 910, 76 S.Ct. 569 (1956), this Court ruled that an ICC order designating motor vehicles carrying certain commodities, but not others, as exempt from permit requirements was in substance a declaratory order, "which touches vital interests of carriers and shippers alike and sets the standard for shaping the manner in which an important segment of the trucking business will be done." *Id.* at 44, 100 L.Ed. at 915. This Court held that the ICC order

> "warns every carrier, who does not have authority from the Commission to transport those commodities, that it does so at the risk of incurring criminal penalties. . . . The determination made by the Commission is not therefore abstract, theoretical, or academic."

Id. at 44, 100 L.Ed. at 914-15. See also *Natick Paperboard Corp. v. Weinberger,* 498 F.2d 125, 128 (1st Cir. 1974). The same principle was stated yet more concisely by Justice Black in *Pennsylvania Railroad Co. v. United States,* 363 U.S. 202, 205, 4 L.Ed.2d 1165, 1168, 80 S.Ct. 1131 (1960):

> "[W]hile a mere 'abstract declaration' on some issue by the Commission may not be judicially reviewable, an order that determines a 'right or obligation' so that 'legal consequences' will flow from it is reviewable. Rochester Tel. Corp. v. United States, 307 U.S. 125, 131, 132, 143, 83 L.Ed. 1147, 1152, 1153, 1159, 59 S.Ct. 754."

In this case the CAB has placed the carriers at the risk of incurring substantial civil and criminal penalties. Its orders have determined rights and obligations from which legal consequences flow. That the CAB has chosen, with an eye to the ongoing process of judicial review, not to enforce its orders cannot change the character, and the susceptibility to judicial review, of those orders.

In the very case cited by the CAB, *Abbott Laboratories v. Gardner, supra,* this Court referred approvingly to the *Frozen Food Express* decision, and then reached a conclusion directly applicable to this case:

> "The Government further contends that the threat of criminal sanctions for noncompliance with a judicially untested regulation is unrealistic; the Solicitor General has represented that if court enforcement becomes necessary, 'the Department of Justice will proceed only civilly for an injunction . . . or by condemnation.' We cannot accept this argument as a sufficient answer to petitioners' petition. This action at its inception was properly brought and this subsequent representation of the Department of Justice should not suffice to defeat it."

387 U.S. at 154, 18 L.Ed.2d at 694-95.

California and the NARUC believe that orders of the CAB, as of any Federal agency, are deserving of respect. Petitioners have pursued their appellate rights presuming the validity and effectiveness of the orders here in question, if found to have been duly issued. The lack of adherence to the rule of law here demonstrated by the carriers and by the CAB itself

ought not to be permitted to frustrate the process of judicial review.

THE QUESTION PRESENTED

In its Brief in Opposition the CAB defines the question presented as whether the Court of Appeals properly declined to consider petitioners' "challenge to a preliminary statement" by the CAB. (CAB Brief 2.) The CAB states that petitioners sought "review of the Board's 'view' that 'air service at Lake Tahoe is interstate in nature by definition.'" (CAB Brief 4.)

California and the NARUC respectfully point out that the question presented in the petition filed herein is whether the Court of Appeals properly affirmed certain orders of the CAB. (Pet. 2.) The Court of Appeals itself recognized that the validity of CAB orders was the matter at issue. (Pet. App. 5.) This Court has not been asked to reach a final resolution of what the CAB calls "the jurisdictional question"—whether, and if so to what extent, air travel to Lake Tahoe from other California points is air transportation as defined by the Federal Aviation Act. Rather, the central issue before this Court is whether an appeals court may properly sustain the validity of an administrative agency's orders, based upon an admittedly inadequate record and creating risk of substantial civil and criminal penalties, on the grounds that the agency, under the pressure of an appeal, has later initiated a separate proceeding to review the evidentiary question.

CONCLUSION

As discussed above, the question presented by petitioners is neither abstract, theoretical nor academic. The CAB's after-the-fact initiation of an investigation and its adoption of a non-enforcement policy cannot affect the validity or invalidity of its orders challenged herein.

Dated, September 12, 1977.

Respectfully submitted,

PAUL RODGERS,
General Counsel,
CHARLES A. SCHNEIDER,
Assistant General Counsel,
WILLIAM R. NUSBAUM,
Deputy Assistant General Counsel,
1102 ICC Building,
P.O. Box 684,
Washington, D.C. 20044,
Attorneys for Respondent the National Association of Regulatory Utility Commissioners.

JANICE E. KERR,
J. CALVIN SIMPSON,
MARTIN A. MATTES,
5066 State Building,
San Francisco, California 94102,
Attorneys for Petitioners the People of the State of California and the Public Utilities Commission of the State of California.